No. 23-142

In the Supreme Court of the United States

JOE L. ADAMS, JR,

Petitioner,

v.

ROYAL PARK NURSING AND REHABILITATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Whether the Fourth Circuit erred in affirming the dismissal of Petitioner's claims for lack of federal subject matter jurisdiction, in that Petitioner did not assert a claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

CORPORATE DISCLOSURE STATEMENT

Respondent LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF MATTHEWS, LLC D/B/A ROYAL PARK OF MATTHEWS REHABILITATION AND HEALTH CENTER (incorrectly named by Petitioner in his complaint "Royal Park Nursing and Rehabilitation") is a North Carolina limited liability company. Its sole member and manager is Liberty Long Term Care, LLC, a North Carolina limited liability Company. Liberty Long Term Care, LLC's sole member and manager is Liberty Healthcare Group, LLC, a North Carolina limited liability company. There is no publicly held corporation owning more than 10% of Liberty Commons Nursing and Rehabilitation Center of Matthews, LLC's stock, or the stock of any parent company.

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The Fourth Circuit opinion is an unpublished *per curiam* opinion, and appears at Pet.App.1.

The opinion of the United States District Court for the Western District of North Carolina is unpublished, and appears at Pet.App.5.

JURISDICTION

Respondent asserts that the federal courts lack jurisdiction over petitioner's claims pursuant to 18 U.S.C. §§ 1331 and 1332.

Respondent does not dispute this Court's jurisdiction to consider this petition pursuant to 28 U.S.C. § 1254(1), but denies that this case satisfies the standards set forth in Supreme Court Rule 10.

COUNTERSTATEMENT OF THE CASE

On November 16, 2020, Petitioner, proceeding *pro se,* filed a complaint in the United States District Court for the Western District of North Carolina. Pet.App.17. In his complaint, Petitioner marked the box for alleging federal question subject matter jurisdiction, but cited no federal statute, treaty, or provision of the United States Constitution as grounds for his suit. Pet.App.21. Although petitioner alleges that Royal Park violated federal regulations in the care

and treatment of his father, he cites no specific federal law or regulation in support of this contention. Pet. App.22. All the specific citations to statutes in the complaint were references to North Carolina statutes. Pet.App.22.

Respondent filed a Motion to Dismiss in district court based on lack of federal subject matter jurisdiction. Pet.App.18. The motion was assigned to a magistrate judge for consideration, and he concluded that "even liberally construing plaintiff's pro se complaint, he has failed to carry his burden to show the existence of subject matter jurisdiction" and issued a Memorandum and Recommendation that Respondent's complaint be dismissed. Pet.App.22.

In an "untimely and improper" second set of written objections to the Memorandum and Recommendation, Petitioner for the first time cited to specific federal statutes and regulations. Pet.App.11. The district court judge concluded, however, that Petitioner had failed to show how these statute or regulations provided federal subject matter jurisdiction, because they did not provide for a private right of action to satisfy federal question jurisdiction. Even considering these newly raised federal statutes and regulations, the district court concluded that he had "failed to cure the jurisdictional requirement" to successfully assert federal question jurisdiction, and granted Respondent's Motion to Dismiss. Pet.App.12.

On appeal to the Fourth Circuit, Petitioner for the first time asserted that jurisdiction was appropriate based on diversity of citizenship. He contended that because he is a citizen of South Carolina and Royal Park is a citizen of North Carolina, there is diversity of jurisdiction. Pet.App.2. The Fourth Circuit held that

because Petitioner sued as power of attorney on behalf of his father, who, at the time the suit began, was a citizen of North Carolina, no diversity existed. The Fourth Circuit affirmed, *per curiam*, the district court's dismissal of Petitioner's suit.[1] Pet.App.3.

In his Petition for Writ of Certiorari, Respondent cites to 42 U.S.C. § 1983, and contends that Section 1983 may be used by private citizens to enforce the Federal Nursing Home Reform Act ("FHNRA") 42 U.S.C. § 1396r. He appears to base this argument on *Talevski v. Health and Hospital Corporation of Marion County*, 6 F.4th 713 (7th Cir. 2021), but he provides no argument that Respondent acted "under color of any state, ordinance, regulation, custom, or usage of any State . . . " that would make Section 1983 applicable.

In addition to the citations to Section 1983 and FHNRA, Petitioner lists 42 C.F.R. 483.12, 42 U.S.C. § 3058i, the Elder Abuse Prevention and Prosecution Act of 2017 and 42 C.F.R. 483.25 as federal statutory and regulatory provisions he contends are involved in his claim. None of these provisions have been interpreted by federal courts to provide any private right of action upon which federal question jurisdiction may rest.

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[1] Petitioner has not listed the rejection of his diversity of citizenship argument by the Fourth Circuit as grounds for his petition for writ of certiorari in his Questions Presented. This argument should therefore be considered abandoned.

REASONS FOR DENYING CERTIORARI

As stated in Rule 10 of this Court's Rules, "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." In this case, no such compelling reason exists. Petitioner has not identified any important issue of federal law requiring decision by this Court, or any conflict between federal Courts of Appeal on any issue raised in his petition.

Moreover, in his Petition to this court, Petitioner raises arguments that were not briefed, argued, or considered by the courts below. In the Western District of North Carolina, plaintiff argued that federal question jurisdiction applied to this case, but initially cited no federal statutes and only generally asserted violations of federal regulations, without any specific citation to the regulations allegedly broken. Pet.App.22. When opposing the adoption of Magistrate Judge Cayer's Memorandum and Recommendation, Petitioner cited to 42 C.F.R. 483.25 and 42 U.S.C. § 3058i—both of which Judge Conrad held did not confer any private right of action. In the Fourth Circuit, Petitioner's argument changed to assert that jurisdiction was proper because of diversity of citizenship. Pet.App.2.

In his Petition to this Court, Mr. Adams has for the first time cited additional specific federal statutes he contends provide a basis for finding federal question jurisdiction. Grounds for liability that were not pleaded, argued, or briefed in the District Court or Court of Appeals are generally not considered by this

Court. *Miree v. DeKalb Cnty., Ga.*, 433 U.S. 25, 34, 97 S. Ct. 2490, 2496, 53 L. Ed. 2d 557 (1977).

In essence, Petitioner's Questions Presented ask this Court to extend federal court jurisdiction to claims against private nursing homes nationwide, based on the application of federal statutes and regulations that were not intended to compel any such result. The cited statutes and regulations govern reimbursement for care under Medicare and Medicaid, provide resources for state and local government to better prevent elder abuse, and provide coordination and assistance for the prosecution of crimes against the elderly. Congress has expressed no intent in any of the statutes or regulations Petitioner cites to create a private federal civil right of action for residents of private nursing homes. This is not an issue upon which a conflict has arisen among the federal courts of appeal; indeed, there are no appellate decisions holding that any of the statutes Petitioner cites create a private right of action. Petitioner has offered no compelling reason for this Court to consider finding such a right.

I. 42 U.S.C. § 1983 PROVIDES NO BASIS FOR JURISDICTION BECAUSE RESPONDENTS DID NOT ACT UNDER COLOR OF STATE LAW.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 2254–55, 101 L. Ed. 2d 40 (1988). "Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach "merely

private conduct, no matter how discriminatory or wrongful, " *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S. Ct. 977, 985, 143 L. Ed. 2d 130 (1999). [internal citations omitted].

The case Petitioner cites in support of the proposition that Section 1983 provides a basis for bringing his case in federal court is the Seventh Circuit's decision in *Talevski v. Health and Hospital Corporation of Marion County* 6 F.4th 713 (7th Cir. 2021). He contends that this decision holds that FHNRA "provides a private right of action that may be redressed under 42 U.S.C. § 1983." It is true that both the Seventh Circuit and subsequently this Court held that Section 1983 actions could be used to enforce compliance with FHNRA provisions for the facility involved in that case, *Health and Hospital Corporation of Marion County v. Talevski,* 599 U.S. ___, 143 S.Ct. 1444, 216 L.Ed. 183 (2023). Central to the decision at both the Seventh Circuit and the Supreme Court, however, was that the facility was a county-owned nursing home and therefore acting "under color of state law." *Id. at* _____, 143 S. Ct.1452, 216 L. Ed. 2d 183 (2023). Indeed, this Court specifically recognized in its opinion that private entity nursing homes "could not be subject to suit under § 1983 anyway." *Id. at* _____, 143 S. Ct.1461, 216 L. Ed. 2d 183 (2023). It does not follow from the decision in *Talevski* that a private nursing home like Royal Park is subject to the same type of Section 1983 suit. Petitioner has not and cannot allege that Royal Park is an arm of the state that is subject to suit under Section 1983.

II. 42 C.F.R. 483.12 AND 42 C.F.R. 483.25

These two federal regulations are part of the "Requirements for States and Long Term Care Facilities" as governed by the Centers for Medicare and Medicaid Services. "The provisions of this part contain the requirements that an institution must meet in order to qualify to participate as a Skilled Nursing Facility in the Medicare program, and as a nursing facility in the Medicaid program. They serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid." 42 C.F.R. § 483.1. They were not designed to create a private federal right of action, but to set the requirements for payment for services in nursing facilities by Medicare and Medicaid.

Neither this Court nor any federal Court of Appeals has ever held that a nursing home resident may file suit in federal court based on these regulations. In *Schneller ex rel. Schneller v. Crozer Chester Med. Ctr.*, 387 F. App'x 289, 293 (3d Cir. 2010) unreported, *credence* 562 U.S. 1287, 131 S.Ct. 1684, 179 L.Ed. 617 (2011), the Third Circuit held that the Medical Requirements for Skilled Nursing Facilities, 42 C.F.R. 483.10 *et seq.* "do not provide a basis for jurisdiction pursuant to § 1331 because they merely set forth the requirements that a facility must meet in order to qualify to participate in Medicare and Medicaid; they do not confer a private cause of action." *Id.* This is the correct interpretation of the purpose and effect of these regulations, and Mr. Adams has not provided this Court with any argument or analysis that would justify a different result in this case.

III. 42 U.S.C. § 3058i

This statute is part of a federal program providing for allotments to States to pay for cost of carrying out vulnerable elder rights protection activities. 42 U.S.C. § 3058. Section 3058i describes activities upon which State agencies can spend the money allotted under the program. Nothing in this statute or any of the related provisions creates any applicable federal right for an individual nursing home resident, or any private right of action that can provide the basis for federal jurisdiction in this matter.

Judge Conrad correctly reached this conclusion in the trial court, citing *Wilkes v. North Carolina*, No. 1:19CV699, 2019 WL 7039631, at *4 (M.D.N.C. Nov. 19, 2019), report and recommendation adopted, No. 1:19CV699, 2019 WL 7037401 (M.D.N.C. Dec. 20, 2019), aff'd, 821 F. App'x 256 (4th Cir. 2020). Other District Courts have also held that "any right of enforcement is left to the state, not to individuals." *Sienze v. Madera Cty. Sheriff's Office*, No. 1:17cv736, 2017 WL 2423672, at *6 (E.D. Ca. June 5, 2017) (unpublished) (finding that "Congress did not intend to create a private right of action under [S]ection 3058i"). *See also Taleff v. Taleff,* No. 18CV1294, 2018 WL 6418541, at *2 (S.D. Ca. Dec. 6, 2018) (unpublished) (quoting 42 U.S.C. § 3058i(b)). There is nothing about Mr. Adams' case which led the Fourth Circuit to disagree with this interpretation, and nothing that should prompt this Court to grant his Petition and consider any contrary result.

IV. THE ELDER ABUSE PREVENTION AND PROSECUTION ACT OF 2017

The Elder Abuse Prevention and Prosecution Act of 2017, PL 115.70, amended or added fourteen provisions of the United States Code to "improve the justice system's response to victims in elder abuse and exploitation cases." 18 U.S.C. §§ 2325, 2326, 2328, 34 U.S.C. §§ 10101, 21701, 21711, 21721, 21722, 21731, 21741, 21742, 21751, and 21752, and 42 U.S.C. § 1397m-1. An analysis of these each these statutes, and of the statutory context in which they are placed, demonstrates that none of them provide support for plaintiff's claims in this lawsuit, or create a question of statutory interpretation for this Court's decision.

Title 18 of the United States Code defines crimes and criminal procedures. As this court has recognized, where there is "nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone," no private right of action should be implied. *Cort v. Ash*, 422 U.S. 66, 79–80, 95 S. Ct. 2080, 2089, 45 L. Ed. 2d 26 (1975).

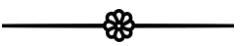
Title 34 of the Code governs Crime Control and Law Enforcement. The provisions of this title created or amended by the Elder Abuse Prevention and Prosecution Act create programs for the Department of Justice to coordinate and support the enforcement of criminal statutes prohibiting elder abuse. The provisions of Title 34 create no private right of action for any of the alleged acts of Respondent during the care of Mr. Adams, Sr., and have no applicability to this case.

42 U.S.C. § 1397m-1 governs grant programs administered by the Department of Health and Human Services for funds authorized to state and local adult protective services offices. Again, there is nothing in this statute that creates any private right of action applicable to nursing home patients.

V. PETITIONER PROVIDES NO ARGUMENT FOR FEDERAL JURISDICTION.

In his Petition, Mr. Adams lists statutes that he contends he relies upon, but the reasons he gives for granting the petition are all restatements of fact or pleas based on his perception of the severity of Mr. Adams, Sr.'s "abuse." While Royal Park could certainly have responded to those allegations at the trial court level if warranted, the central issue in this lawsuit has always been whether federal courts have jurisdiction to hear Petitioner's complaints. Despite the centrality of this issue, Mr. Adams provides no basis for this Court to conclude *how* any of the statutes he lists in his petition create a private right of action, or confer jurisdiction on the federal courts to hear his claims.

Even if this Court were to give serious consideration to an argument that any of the statutes listed give rise to a private right of action, this is not the case to do so. A pro se petitioner has offered no reasoning in support of his legal assertions, those assertions were not considered by the Courts below. Mr. Adams' Petition is hardly the best opportunity to rule on such important and potentially far-reaching questions concerning the scope of these statutes.



CONCLUSION

For all these reasons, the Court should deny Mr. Adams Jr.'s petition for writ of certiorari.

Respectfully submitted,

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